Nos. 04-1034 and 04-1384

In The Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; PINE RIVER BLUFF ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER; FRANCES GORDENKER,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

PATRICK J. WRIGHT
Counsel of Record
MACKINAC CENTER FOR PUBLIC POLICY
140 West Main Street
P.O. Box 568
Midland, Michigan 48640
Telephone: (989) 631-0900
Facsimile: (989) 631-0964
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
A. Background	5
B. Congress' jurisdictional intent	9
C. Commerce Clause	19
D. Michigan's wetlands regulatory approach	23
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 13, 14, 16, 18

Gonzales v. Raich, 545 U.S. ___; 125 S. Ct. 2195 (2005) 2, 3, 19, 20, 21

Morrison v. Brzonkala, 529 U.S. 598 (2000) 21

Natural Res. Def. Council v. Callaway, 392 F. Supp. 685 (D. D.C. 1975) 11

Panama Ref. Co. v. Ryan, 293 U.S. 238 (1935) 4

Schechter Poultry Corp. v. United States, 293 U.S. 495 (1935) 4

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) ..... *passim*

United States v. Gerke Excavating, Inc., 412 F.3d 804 (7th Cir. 2005) 1

United States v. Lopez, 514 U.S. 549 (1995) 21

United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003) 8

United States v. Riverside Bayview Homes, Inc., 729 F.2d 391 (6th Cir. 1984), *rev'd, United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 12, 13

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) ..... *passim*

Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457 (2001) 4

Wickard v. Filburn, 317 U.S. 111 (1942) 20

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Art. I, § 1, cl. 1 3

STATUTES

33 U.S.C. § 1311(a) 10
33 U.S.C. § 1344(a) 10
33 U.S.C. § 1344(f) 27
33 U.S.C. § 1344(g) 9, 23
33 U.S.C. § 1344(h) 23
33 U.S.C. § 1362(6) 10
33 U.S.C. § 1362(7) 6, 10
33 U.S.C. § 1362(12) 10
Mich. Comp. Laws §§ 324.30301-23 23
Mich. Comp. Laws § 324.30301(p) 24
Mich. Comp. Laws § 324.30305 27

REGULATIONS

33 C.F.R. § 209.120(d)(1) (1974) 11
33 C.F.R. § 328.3 (2005) 2, 7
40 C.F.R. § 233.1(c) (2005) 24
40 C.F.R. § 233.1(d) (2005) 23
40 C.F.R. § 233.70 (2005) 23
37 Fed. Reg. 18,289 (Sept. 9, 1972) 11
40 Fed. Reg. 31,320 (July 25, 1975) 11

TABLE OF AUTHORITIES – Continued

Page

42 Fed. Reg. 37,122 (July 19, 1977) 11

53 Fed. Reg. 20776 (June 1, 1988) 23

68 Fed. Reg. 772 (Jan. 7, 2003) 25

Mich. Admin. Code r. 281.921(b) (2004) 24

MISCELLANEOUS

H.R. Rep. No. 92-1323 (1972) 10

INTEREST OF AMICUS CURIAE[1]

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

Amicus curiae is in a unique position to discuss the instant cases, since the properties in question lie in Michigan, and since one of the Center's staff members is a former head of the Michigan Department of Environmental Quality (MDEQ), the state agency that administers the Michigan wetlands program.

INTRODUCTION AND SUMMARY OF ARGUMENT

There are estimated to be more than 100 million acres of wetlands in the contiguous United States. *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 806 (7th Cir. 2005). Through its expansive regulatory definition, the Army Corps of Engineers (Corps) has claimed jurisdiction over a substantial portion of this vast acreage.

But this Court has made clear that under the Clean Water Act (CWA), Congress intended to assert jurisdiction over only those wetlands adjacent to and inseparably bound up with "navigable waters," where "navigable" means

[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part, nor did any person or entity, other than the amicus curiae, its members or its counsel make a monetary contribution to the preparation or submission of this brief.

waters that are, were, or could reasonably become navigable in fact. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) (*SWANCC*). None of the properties involved in the consolidated cases meets this Court's definition of federally controlled wetlands, because the instant wetlands are not adjacent to and inseparably bound up with such navigable waters. As a consequence, the Corps has no jurisdiction over the instant wetlands.

Even if this Court now finds that the Corps' claim of jurisdiction over the instant wetlands is in keeping with Congress' intent, Congress would exceed its power under the Commerce Clause when the Corps' regulation at issue, 33 C.F.R. § 328.3 (2005), is applied to the instant properties. The regulation is not limited to channels of interstate commerce, and attempts to justify the regulation by appealing to the "substantial effects" commerce test (most recently elaborated in *Gonzales v. Raich*, 545 U.S. ___; 125 S. Ct. 2195 (2005)) are not persuasive in the instant cases, because this regulation does not concern a market-related statute, as the "substantial effects" test requires.

Since all of the properties in these consolidated cases are located in Michigan, and since federal jurisdiction over the instant wetlands is improper, a review of Michigan wetlands law and regulations will likely be of some interest.[2] It is clear that Michigan's regulatory system generally mirrors the federal system, probably because Michigan's

---

[2] This discussion should not be taken to imply that amicus curiae agrees that Michigan wetlands laws and regulations represent optimal public policy.

laws must be similar to, and perhaps as stringent as, federal law in order for the state to retain a modicum of control over the fill-permitting process. Michigan's permitting system is currently under review by the Environmental Protection Agency (EPA), and the EPA has demanded that Michigan make statutory changes, promulgate specific regulations, and issue attorney general opinions with foreordained results. This review process suggests the negative effect that federal CWA jurisdiction can have on our federalist system of government when that jurisdiction is construed too broadly.

Justice O'Connor recently explained the importance of limiting the power of Congress to regulate under the Commerce Clause:

> We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

Raich, 125 S. Ct. at 2221 (O'Connor, J., dissenting).

Exacerbating the federalist concerns presented in these cases is another constitutional issue: the nondelegation doctrine. Article I, Section 1 of the Constitution vests all "legislative powers herein granted . . . in a Congress of the United States." This Court has explained that the Constitution "permits no delegation of those powers."

Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 472 (2001). But this Court has historically held that Congress can constitutionally delegate rulemaking authority to an executive agency if Congress sets forth an "intelligible principle" to which that agency must conform. *Id.* Using this intelligible principle benchmark, this Court has not used the nondelegation doctrine to strike down a single federal law since 1935. *See generally Panama Ref. Co. v. Ryan*, 293 U.S. 238 (1935); *Schechter Poultry Corp. v. United States*, 293 U.S. 495 (1935).

In *Whitman*, Justices Stevens and Souter acknowledged that rulemaking is often the functional equivalent of legislative power. 531 U.S. at 488-89 (Stevens, J., concurring). They would hold that such delegations are generally proper. Justice Thomas, on the other hand, stated that "I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" *Id.* at 487 (Thomas, J., concurring). He expressed willingness "to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." *Id.*

The nondelegation issue is not overtly presented in either of the instant cases, since this Court granted certiorari solely on the statutory and Commerce Clause issues. But the nondelegation doctrine is worth prominent mention here since it appears that in *SWANCC*, this Court forewarned that it will not defer to agency rules that press the outer limits of Congress' constitutional power unless Congress explicitly permitted that result in legislation. *SWANCC*, 531 U.S. at 172-73. Clearly, such agency rules

are too important to be left to unelected and largely unaccountable agencies. In other words, where the limits of Congress' constitutional powers are involved, "the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'" This conclusion is particularly true in the instant cases, where a rule promulgated by the Corps has substantially expanded the scope of federal jurisdiction.

This *SWANCC* doctrine is laudable as far as it goes, in that it at least exempts a subset of significant questions – constitutional questions – from the control of federal agencies. Unfortunately, the decision still leaves other significant questions within federal agencies' control.

Regardless, as noted above, this Court need not reach the nondelegation issue. This Court's recent rulings make clear that the Corps has overreached in its current statutory interpretation of Congress' intent in the CWA, rendering invalid the Corps' claim of jurisdiction in the instant cases. Even if this Court does rule that the Corps has properly carried out Congress' intent by extending federal jurisdiction to the instant wetlands, Congress' action would unconstitutionally exceed the power granted to Congress under the Commerce Clause.

ARGUMENT

A. Background

These consolidated cases concern four properties. John Rapanos or his affiliated parties were held to be civilly liable for filling wetlands without a permit on three separate properties: Salzburg, Hines Road, and Pine

River.[3] The Carabell property owners were denied a permit to place fill on a single property. In both cases, the petitioners claim that federal jurisdiction does not extend to their property; therefore, even if there are wetlands on the properties, those wetlands cannot be regulated by the Corps.

An issue in these cases is the proper meaning of "navigable waters," which for purposes of the CWA, was defined by Congress as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).[4] The Corps was delegated the responsibility to further define "waters of the United States." The pertinent part of the Corps' current (and overly expansive) definition is:

> (a) The term waters of the United States means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of

---

[3] John Rapanos also was criminally convicted for improperly placing fill on the Salzburg property. The criminal conviction is not at issue here.

[4] The history of the CWA and of the federal regulations regarding the Corps' definition of "navigable waters" and/or "waters of the United States" will be discussed in more detail below.

which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3 (2005).

It is unclear whether water from the Carabell petitioners' property ever reaches water that meets the definition in (a)(1).[5] The magistrate judge's recommendation, which was accepted in its entirety by the district court, described the property as follows:

---

[5] As will be discussed below, in *SWANCC*, this Court has clearly held that Congress meant to regulate waters that meet the (a)(1) definition and those wetlands adjacent to and inseparably bound up with such waters.

> Plaintiff's property in this case is not isolated. It is undisputed that the property is adjacent to an unnamed ditch, and that ditch connects to the Sutherland-Oemig Drain. (Tr. 55-61). The Drain, which neighbors a corner of the property, connects to Lake St. Clair.

Carabell App. at 46a. The unnamed ditch appears to have been dug "some 50-60 years ago." *Id.* at 62a. The spoils from that ditch left a man-made berm that separates the property from the ditch. *Id.* The Carabell property owners claimed that the water from the property never reached the drain, *id.* at 22a, but the magistrate judge did not make a specific finding in this regard.

A specific finding was made in regard to all three properties owned by the Rapanos petitioners; the trial court found that water from all three properties would eventually reach water that meets the (a)(1) definition. At the Salzburg site, the water entered a drain, then a tributary, then a river, then a second river, before it could reach Lake Huron. Rapanos App. at B11. At the Hines Road site, the water went from a drain to a navigable river. *Id.* at B20. Finally, at the Pine River site, there was a connection to a river that drained into Lake Huron. *Id.* at B26. The Rapanos petitioners claim that the nearest navigable water for the Salzburg site is twenty miles away, Cert. Brief of Rapanos Pet'rs-Appellants at 6, but the trial court did not make a specific finding in this regard. Nevertheless, a portion of the Salzburg site was the basis of John Rapanos' criminal conviction, and the Sixth Circuit stated, "During the course of this proceeding, the wetlands in question have been described as between eleven and twenty miles from the nearest navigable-in-fact water." *United States v. Rapanos*, 339 F.3d 447, 449 (6th

Cir. 2003). No findings were made regarding the distances to navigable waters for the Hines Road and Pine River sites.

Thus, with the Carabell site, this Court is faced with a property abutting a drain that may or may not receive surface runoff from the property. With the Rapanos sites, runoff from all three properties may eventually reach a body of water that meets the (a)(1) definition, but it is not clear how far the runoff would have to travel to reach such waters, nor is it clear what the filtering effects of such an extended route might be. In both cases, the property owners contend that their property is not covered by the CWA.

B. Congress' jurisdictional intent

Assuming that the federal permitting scheme controls in the instant cases,[6] this Court must determine whether the Corps through its current definition of "waters of the United States" has properly interpreted Congress' intent regarding the waters that are to be regulated under the CWA. This Court has discussed the bounds of federal jurisdiction over wetlands in two cases: *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); and *SWANCC*. When these cases are read in conjunction, it is clear that Congress intended to limit the CWA's jurisdictional reach to waters covered by the Corps' 1974 definition[7] of navigable waters and to wetlands adjacent to and inseparably bound up with such waters.

---

[6] Michigan law regarding wetlands and the effect of 33 U.S.C. § 1344(g) will be discussed below.

[7] This definition will be set forth below.

This conclusion is justified by the statutory and regulatory history related to the CWA and the Corps' definition of "navigable waters" and/or "waters of the United States." As part of the Federal Water Pollution Control Act (FWPCA) Amendments of 1972,[8] Congress created a program for issuing fill permits. Under this program, the "discharge" of any "pollutant" is generally prohibited. 33 U.S.C. § 1311(a). Rock, sand, and dirt are treated as pollutants, 33 U.S.C. § 1362(6), and discharge is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A party that wants to discharge fill into a "navigable water" has to obtain a permit, 33 U.S.C. § 1344(a), and most importantly to the instant cases, "navigable waters" is defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

It is clear that in enacting the definition in § 1362(7), Congress was simply attempting to remedy perceived shortcomings in the Corps' interpretation of the term "navigable waters" under sections 10 and 13 of the Rivers and Harbors Act of 1899. In a report published in 1972, Congress admonished the Corps for merely seeking jurisdiction over navigable-in-fact waters, instead of including waters that had been navigable in fact, or waters that with reasonable improvements could become navigable in fact. H.R. Rep. No. 92-1323 at 29-30 (1972).

After this admonishment, and one month prior to the enactment of the FWPCA Amendments of 1972, the Corps promulgated a regulation that defined "navigable waters" as "those waters which are presently, or have been in the

[8] The Federal Water Pollution Control Act is the CWA's formal title.

past, or may be in the future susceptible for use for purposes on interstate or foreign commerce." 37 Fed. Reg. 18,289, 18,290 (Sept. 9, 1972).

The definition was expanded slightly in 1974. The Corps defined "navigable waters" as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974).

A lawsuit was brought challenging this definition on grounds that it was not broad enough, and a district court judge held that Congress meant to assert jurisdiction over water to the fullest extent permissible under the Commerce Clause, a concept the court did not define. *Natural Res. Def. Council v. Callaway*, 392 F. Supp. 685 (D. D.C. 1975). The Corps was given forty days to issue a new regulation.

Rather than appeal, the Corps instead promulgated an interim regulation that significantly broadened the definition of "navigable waters" to include "freshwater wetlands including marshes, shallows, swamps and similar areas that are contiguous or adjacent to other navigable waters." 40 Fed. Reg. 31,320, 31,324 (July 25, 1975). Other navigable waters included tributaries of rivers, lakes, and streams. *Id.* Also included were "intrastate lakes, rivers, and streams" that were used recreationally or that were tangentially related to commercial fishing, industry, or agriculture. *Id.*

In 1977, the Corps finalized the regulation. 42 Fed. Reg. 37,122 (July 19, 1977). At that time, Congress was considering amendments to the CWA. An amendment that

would have limited federal jurisdiction of wetlands to the Corps' more narrow 1974 definition passed the House, but a similar amendment was defeated in the Senate. Hence, the CWA amendments that Congress passed on December 27, 1977, did not change the CWA definition of "navigable waters."

Over the years, the Corps' 1977 definition of "navigable waters" has become slightly more expansive, and eventually the Corps settled on its current definition of "waters of the United States." Aside from the creation of the Migratory Bird Rule (discussed below), the course of definitional changes from 1977 to the present is not pertinent here.

This Court's first decision regarding the scope of federal jurisdiction under the CWA was *Riverside Bayview Homes*. There, this Court determined whether the owner of "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan" needed to obtain a fill permit.[9] 474 U.S. at 124. The wetlands at issue extended past the owner's property line and were adjacent to a navigable creek. *Id.* at 131. This Court indicated that there were two questions presented: (1) whether the property was an "adjacent wetland" under the regulation (essentially the same regulation at issue here);

---

[9] This description seems incomplete given that the property had been platted for a subdivision as early as 1916, at which time storm drains and fire hydrants were installed. *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 392 (6th Cir. 1984), *rev'd*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Further, the wetlands came into being only in 1973, due to the creation of an emergency dike in relation to rising water levels in Lake St. Clair. *Id.* at 393. The owner started filling the property in 1976.

and (2) whether the Corps could require the owner to obtain a permit.

Foreshadowing this Court's actions in *SWANCC*, the Sixth Circuit had narrowly construed the Corps' jurisdictional regulation in its *Riverside Bayview Homes* decision to avoid a constitutional problem – in that case, a potential regulatory taking, rather than the scope of Congress' commerce power, the issue presented in the instant cases.[10]

But this Court held that there was no justification for the Sixth Circuit's narrow construction of the regulation, since even if there were to be a taking, the owner of the property would be compensated. Therefore, this Court did not believe that there was a serious constitutional issue presented.

This Court then indicated that in enacting the CWA, Congress did not choose to limit the waters covered to traditional navigable waters. Congress' decision to define "navigable waters" as "waters of the United States" meant that the term "'navigable' as used in the act is of limited import." 474 U.S. at 133. This Court stated that Congress intended to "regulate at least some waters that would not be deemed 'navigable' under the classic definition of that term," *id.*, concluding that it was permissible for the Corps to regulate wetlands that were adjacent "to waters as more conventionally defined." *Id.* The Corps' conclusion "that adjacent wetlands are inseparably bound up with the 'waters' of the United States," *id.* at 134, was cited with

[10] The Sixth Circuit's decision was issued three months before this Court's decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Sixth Circuit therefore did not address that case.

approval. Thus, this Court held that the Corps' construction of the statute was entitled to deference under *Chevron*. In *Riverside Bayview Homes*, unlike *SWANCC*, this Court did not discuss whether a Commerce Clause consideration would prevent deference to the agency's interpretation of its jurisdiction under the CWA. Thus, this Court concluded that the Corps properly asserted jurisdiction over the wetlands at issue.

This Court also noted that it was not "called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Id.* at 131-32 n. 8. Therefore, the key concepts were that the wetlands needed to be adjacent to "open water" and inseparably bound up with those waters.

This Court's second case discussing federal jurisdiction under the CWA was *SWANCC*. There, a consortium of Illinois municipalities was seeking to locate and develop a disposal site for nonhazardous solid waste. The consortium chose an abandoned sand and gravel pit. Over the course of time, the excavation trenches from that site became seasonal ponds. The consortium sought to fill some of these ponds. The Corps originally concluded that it did not have jurisdiction over the ponds because they did not meet the definition of wetlands. But in 1986, the Corps, without following the dictates of the Administrative Procedure Act, had issued the "Migratory Bird Rule." This regulation purported to give the Corps jurisdiction over intrastate water that could be a habitat of migratory birds.

After the Corps claimed that it had jurisdiction solely due to the Migratory Bird Rule and denied the consortium a fill permit, the consortium brought suit. This Court held

that the Migratory Bird Rule was not fairly supported by the CWA. It also clarified the *Riverside Bayview Homes* holding.

In *SWANCC*, this Court explained that the key concept in *Riverside Bayview Homes* was the proximity of the wetlands to traditional navigable waters:

> [W]e held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.* at 133. But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See 474 U.S. at 135-139. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." 474 U.S. at 134.
>
> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . ." 474 U.S. at 131-132, n. 8. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

531 U.S. at 167-68.

This Court emphasized that the Corps' 1974 regulation correctly set forth Congress' intent about the waters to be regulated. *Id.* at 168. This Court rejected the argument that Congress acquiesced in 1977 to the Corps' broadened definition of CWA jurisdiction; rather, the most Congress had contemplated in 1977 was extending federal jurisdiction to waters covered by the Corps' 1974 regulation and wetlands that were adjacent to and inseparably bound up with those waters:

> We conclude that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence to the Corps' [1977] regulations or the "Migratory Bird Rule," which, of course, did not first appear until 1986. . . . Beyond Congress' desire to regulate wetlands adjacent to "navigable waters," respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.

Id. at 170-71.

The next question addressed was whether *Chevron* deference should apply. Under the traditional *Chevron* analysis, when construing an agency regulation, the courts must consider two issues: (1) whether Congress' intent was clear, since Congress' clear intent must be given effect; and (2) whether, in cases where Congress' intent was not clear, the agency's interpretation was based on a permissible construction of the statute. 467 U.S. at 842-43. The courts defer to the agency's determination whenever an agency must fill a statutory gap. *Id.* at 843-44.

In *SWANCC*, this Court held that the CWA was clear. This ruling would ordinarily end the analysis; however, this Court then went on to address the level of deference the courts should give an agency regulation that nears a boundary of Congress' power:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. See *ibid*. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. See *United States v. Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) ("Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

531 U.S. at 172-73.

The above is an exception to the norm of agency deference. Respectfully, however, this Court's ruling in

SWANCC is a partial solution to a much larger underlying problem: the delegation of important legislative issues to unelected and largely unaccountable federal agencies. *SWANCC* does require that the people's elected representatives explicitly make the decision that pushes the boundaries of Congress' constitutional powers, but this still leaves many other significant issues to be decided by federal agencies.

Whatever the basis for *SWANCC*'s modified *Chevron* rule, it is clear that the Corps' current, expansive jurisdictional regulation should not control in these cases. As a primary matter, in *SWANCC*, this Court held that the CWA was clear; Congress intended to regulate only those waters that meet the Corps' 1974 definition of "navigable waters" and those wetlands that were adjacent to and inseparably bound up with those waters. None of the instant properties meets this conjunctive test. None of the properties is adjacent to waters that are navigable, were navigable, or with reasonable effort could become navigable. Therefore, federal jurisdiction should not extend to any of the properties.

But even if this Court now determines that the CWA is ambiguous, the modified *Chevron* rule does not grant deference to an agency determination that pushes the limit of congressional authority, as the Corps' current definition clearly does. Hence, the regulation should be interpreted to avoid constitutional issues, a goal this Court can accomplish by interpreting the regulation to extend jurisdiction only to waters like those in *Riverside Bayview Homes* and *SWANCC* – waters that meet the Corps' 1974 definition, as well as wetlands that are adjacent to and inseparably bound up with the waters in that definition.

C. Commerce Clause

If this Court were to find that Congress intended to regulate wetlands like those of the petitioners', this Court should nevertheless rule that Congress has exceeded its commerce power, since a nonadjacent wetland or a wetland that is not bound up with traditional navigable waters is not a channel of interstate commerce. Further, this Court should reject any attempt to use the "substantial effects" theory to justify the constitutionality of such a congressional action. This Court has countenanced this theory only when a market-based statute is being interpreted.

In *Raich*, this Court discussed Congress' commerce power. There are three general categories under which Congress may engage its commerce power: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *Raich*, 125 S. Ct. at 2205.

This Court clarified that the substantial effects test applies only to market-based statutes – a point that may prove dispositive in the instant cases. *Raich* involved a challenge to the Controlled Substances Act (CSA), and in that statute, Congress sought to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Id.* at 2203. To achieve these goals, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance." *Id.* The petitioners in *Raich* were Californians who sought to use medical marijuana under a state law that allowed such use. The petitioners

did not challenge the CSA in its entirety; rather, they challenged its application to them.

In *Raich*, this Court discussed *Wickard v. Filburn*, 317 U.S. 111 (1942), a case in which a farmer was prohibited from growing more wheat than permitted under a federal administrative mandate. There, the farmer was going to consume the excess wheat on his own farm, and he argued that Congress did not have the power to regulate the wheat that was intended for his home use. In *Raich*, this Court held that local activities may be regulated when those local activities would have a substantial effect on a national market:

> Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. . . . When Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class. . . . In this vein, we have reiterated that when "'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'"
>
> . . .
>
> *Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

Id. at 2205-06 (some citations omitted).

This Court also distinguished two of its recent Commerce Clause cases: *United States v. Lopez*, 514 U.S. 549 (1995); and *Morrison v. Brzonkala*, 529 U.S. 598 (2000). In *Lopez*, this Court overturned the Gun-Free School Zones Act of 1990, and in *Morrison*, this Court overturned a provision of the Violence Against Women Act of 1994 that created a federal civil remedy for the victims of gender-motivated crimes of violence. In *Raich*, this Court clarified that the key concept was that neither case concerned economic statutes:

> Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.

Raich, 125 S. Ct. at 2211.

Justice Scalia concurred in *Raich*, but his analysis differed from that of the majority. Specifically, he believed that the substantial effects test was in reality a subset of Congress' power to enact legislation under the Necessary and Proper Clause. But like the majority, Justice Scalia would not allow Congress to regulate local activity where no market is involved: "the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective." *Id.* at 2218 (Scalia, J., concurring)

Clearly, the CWA is not a market statute, since it does not deal with the production, distribution, and consumption of commodities. The pollutants being regulated are not commodities intended for purchase by consumers, and any emission of the "pollutants" would be incidental and haphazard – not an organized process of bringing commodities to market for sale. Therefore, the substantial effects test does not apply.

Respondents may argue that in reality the CWA is a regulation of interstate channels of commerce. And indeed, to the extent that the CWA is limited to waters that either are navigable, were navigable, or with reasonable effort could become navigable, the CWA is a permissible exercise of Congress' commerce power, since these waters do constitute channels of interstate commerce. But Congress could not include wetlands that are not adjacent to the above waters or wetlands that are not inseparably bound up with such waters, because such wetlands do not constitute a channel of interstate commerce.

Respondents may argue that aggregated pollution from wetlands that are not adjacent or inseparably bound up with traditional navigable waters nevertheless produces a substantial effect on channels of interstate commerce. But this is an impermissible merger of two distinct Commerce Clause categories. Again, the substantial effects test is limited to market-based statutes. Therefore, if in enacting the CWA, Congress intended to regulate property like the petitioners', it exceeded its powers under the Commerce Clause.

D. Michigan's wetlands regulatory approach

Since both consolidated cases concern Michigan properties, this Court may be interested in Michigan wetlands law.[11] Indeed, the interaction of Michigan and federal wetlands law is instructive in this case, since it suggests that the federal agency's broad construction of its own jurisdiction promotes an imbalance in the federal-state relationship.

As part of the FWPCA Amendments of 1977, Congress enacted 33 U.S.C. § 1344(g) and (h), which allow a state to assume responsibility for issuing permits for the discharge of dredge or fill material. Michigan assumed authority for wetlands permitting in 1984, 40 C.F.R. § 233.70 (2005); Michigan is one of two states that have assumed such responsibility (the other is New Jersey).

Michigan's Wetlands Protection Act was enacted in 1979. In 1995, the state Legislature repealed it and then substantially re-enacted it as part of the state's Natural Resources and Environmental Protection Act. The wetlands protection section is currently codified at Mich. Comp. Laws §§ 324.30301-23. The CWA does not contain an explicit requirement that a state's permitting program be as stringent as the CWA, but the EPA, which authorizes state programs, has specifically interpreted it in that manner in a federal regulation. 40 C.F.R. § 233.1(d) (2005).[12] According to the EPA, nothing prevents a state

---

[11] As mentioned earlier, the fact that Michigan laws and regulations are being discussed does not mean that amicus curiae believes that such laws and regulations reflect optimal public policy.

[12] This interpretation was implemented in 1988, after the Michigan program had already been approved. 53 Fed. Reg. 20776 (June 1, 1988).

from enacting more stringent requirements than those found in the CWA. 40 C.F.R. § 233.1(c) (2005).

Michigan asserts jurisdiction over wetlands that are (1) contiguous to the Great Lakes, Lake St. Clair, an inland lake or pond, or a river or stream; (2) not contiguous to any waters above, but more than five acres in size in a county with more than 100,000 residents;[13] (3) not contiguous to any waters in (1), but more than five acres in size in a county with less than 100,000 residents where a wetlands inventory has been completed for that county;[14] and (4) not contiguous to any waters in (1) and less than five acres in size where a determination is made that preservation of that wetland is necessary to protect the state's natural resources from destruction. Mich. Comp. Laws § 324.30301(p).

The MDEQ defines "contiguous" to mean either a seasonal or intermittent direct surface water connection with a lake, pond, river, or stream. Mich. Admin. Code r. 281.921(b) (2004). Also considered "contiguous" are any waters within 500 feet of a lake, pond, river, or stream, and any water within 1000 feet of a Great Lake or Lake St. Clair. *Id.* Wetlands that are separated from other

---

[13] According to the 2000 Census, twenty of Michigan's eighty-three counties have more than 100,000 residents. http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_PL_U_GCTPL_ST2&format=ST-2&_box_head_nbr=GCT-PL&ds_name=DEC_2000_PL_U&geo_id=04000US26

[14] There are twenty-two counties in Michigan that have not been inventoried: the twelve most western counties located in the upper peninsula, and ten counties in the northwest portion of the lower peninsula. http://www.michigan.gov/cgi/0,1607,7-158-12540_13817_22351-58858--,00.html. The MDEQ hopes to complete the inventory of the remaining counties by next year.

wetlands by dikes, roads, berms, and the like, but are otherwise close to lakes, ponds, rivers, or streams, are also considered contiguous.

While Michigan has been delegated the right to generally administer the fill-permitting process, the EPA can withdraw that designation. Michigan is currently undergoing an EPA review in order to keep its program. Preliminary findings were published in 2003, 68 Fed. Reg. 772 (Jan. 7, 2003), based on a 100-page report issued by the EPA's Region 5.[15] The EPA indicated that in light of the progress on the state's wetlands inventory and of legal uncertainty regarding the proper scope of federal jurisdiction, Michigan's jurisdictional requirements remain as stringent as the federal requirements, although the issue could be revisited later:

> Michigan's longstanding exclusion from regulation of all noncontiguous wetlands of any size that are located in a county with a population under 100,000 is a continuing concern for EPA. . . . If the wetland inventorying project is completed, EPA believes that our most significant concern with the scope of jurisdiction with Part 303 will be resolved. Furthermore, EPA expects that during the five years that these wetland inventories are being performed, the issues of the CWA's jurisdiction over isolated wetlands will be resolved and that EPA will have future discussions with Michigan regarding how the resolution of the CWA's jurisdiction impacts on

[15] This document is available at http://www.epa.gov/region5/water/wshednps/pdf/mi_404_program_review.pdf. This document will be cited as "Region 5 Review."

> Michigan's administration of the section 404 program.
>
> With respect to the 5-acre limitation imposed by Part 303's definition of the term "wetland" at § 324.30301(d), in light of the uncertainties about federal CWA jurisdiction created by the *SWANCC* decision, and the absence of EPA or Corps final guidance on the effect of *SWANCC*, at this time EPA does not conclude that Part 303's exclusion from regulatory jurisdiction of noncontiguous wetlands that are 5 acres or less renders Michigan's law less stringent than the federal law. This issue, too, may be revisited by EPA and Michigan in the future.

Region 5 Review at 7-8.

The EPA's preliminary finding about federal and Michigan jurisdiction is not dispositive, but is nevertheless worthy of mention in light of the Sixth Circuit's decision in the instant Rapanos case. There, the Sixth Circuit held that the district court was not required to make a determination whether the wetlands at issue were at least five acres, since Michigan did not have the authority to "alter the CWA's federal jurisdiction," and since there was "nothing in the CWA to suggest that by allowing Michigan to enforce portions of the CWA, the Corps was delegating the authority to the state to determine the limitations on CWA jurisdiction." Rapanos App. at A31.

But factoring in the EPA's claim that Michigan jurisdiction is coextensive with federal jurisdiction, an interesting question arises. If the state standards must be at least as stringent as the federal standards, and if the state has the responsibility for issuing the fill permits, why should not the state standards control? There would appear to be

no utility in referring to two separate sets of law when the federal agency already determined in 1984 that state law is as stringent. Presumably, if there were gaps in state law, the federal agencies would have refused to certify the state permitting program. This would seem to foreclose any argument that Michigan's law is less stringent, particularly when the federal government is making the claim.

Still, it is the understanding of amicus curiae that the Rapanos petitioners will not be addressing these issues. Thus, while such a question might be interesting, it is not among the questions presented to this Court.

The second area that the EPA is reviewing is Michigan's permit exemptions. The federal exemptions are found at 33 U.S.C. § 1344(f). Included in these exemptions are such activities as farming, silviculture (the care and cultivation of trees), some activities related to ranching, maintenance of dikes and levees, creation of stock ponds or irrigation ditches, maintenance of drainage ditches, and the creation of farm and forest roads. *Id.* Michigan's largely parallel provision is Mich. Comp. Laws § 324.30305.

In the EPA's review, numerous concerns were expressed about the Michigan exemptions. For example, the EPA noted that Michigan law did not limit its farming, ranching, or silviculture exemptions to those activities that were already established. Region 5 Review at 11. Another concern was that unlike federal law, Michigan law did not prohibit placing fill to convert the property from one exempted use to another – for example, from silviculture to farming. *Id.*

But in contrast to its jurisdictional review of Michigan's program, the EPA demanded statutory and regulatory changes to meet perceived shortcomings in Michigan's exemptions. For example, it demanded a statutory change to limit the agricultural exemption to already existing agricultural operations. *Id.* The EPA also demanded the promulgation of a state regulation delineating the geographical area covered by the agricultural exemption. *Id.* This regulation is supposed to mirror a federal appellate decision. The EPA also asserted that "it would be helpful to have the Attorney General's Office issue an Attorney General's opinion stating that the § 324.30305(2)(e) exemptions, as amended, as well as other exemptions established by Michigan law . . . shall be interpreted and applied by the MDEQ to be as stringent as the comparable federal exemptions." *Id.* at 11-12. The EPA made many other similar demands for statutory changes, regulatory changes, and Attorney General opinions.

This review process highlights federalism concerns present in the instant cases. In the EPA review, an unelected and largely unaccountable federal agency has placed a number of demands on Michigan's elected public officials. Granted, Michigan could choose not to participate in the wetlands permitting program, but it may well be that Michigan is willingly subjecting itself to such oversight precisely because the Corps has interpreted its jurisdiction so broadly that significant portions of Michigan are within the Corps' putative control. Michigan's subjecting itself to federal agency oversight is ultimately the only way the state can retain some modicum of local control over the issuance of fill permits and hopefully respond more quickly to citizens' requests.

If the Corps' jurisdiction were properly limited to its 1974 definition of navigable waters and those wetlands adjacent to and inseparably bound up with such waters, Michigan might choose to let the federal government administer its (now more modest) CWA program. At the same time, the state could then experiment with its own wetlands regulation more fully than it currently does, rather than promulgating policies that are – and must be – as stringent as those of the federal government. Such an arrangement would enable Michigan to serve as a true laboratory of democracy and perhaps discover an optimal public policy. A proper ruling from this Court would give Michigan and its citizens that freedom.

CONCLUSION

For the reasons set forth above, this Court should hold that all the properties at issue in these consolidated cases are not within federal jurisdiction.

DATED: December 2, 2005.

Respectfully submitted,

PATRICK J. WRIGHT
Counsel of Record
MACKINAC CENTER FOR PUBLIC POLICY
140 West Main Street
P.O. Box 568
Midland, Michigan 48640
Telephone: (989) 631-0900
Facsimile: (989) 631-0964
Counsel for Amicus Curiae